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FREEDOM OF MOVEMENT

Working paper on the right to freedom of movement and related issues prepared by Mr. Volodymyr Boutkevitch in implementation of Decision 1996/109 of the Sub-Commission

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Introduction

1. At its 48th session, the Sub-Commission on Prevention of Discrimination and Protection of Minorities, mindful of the links between the protection of minorities, prevention of discrimination, population movements and displacements, freedom of movement, the right to leave and to return to one's own country and the right to seek and enjoy asylum, decided, without a vote, to entrust Mr. Volodymyr Boutkevitch with the task of preparing, without financial implications, a working paper on the right to freedom of movement and related issues and to submit it to the Sub-Commission at its 49th session (decision 1996/109 of the Sub-Commission). In the course of the general debate on the draft text of this decision, the discussion revolved around the words: "working paper on the right to freedom of movement and related issues". The proposals made reduced to giving the task a specific form. In this connection, it was proposed that a member of the Sub-Commission be given the opportunity to work more effectively on the paper.

2. To ensure that the task was carried out effectively, it was proposed that the decision should specifically require the Special Rapporteur to prepare a working paper on the content of the right to freedom of movement, its implementation and the obstacles to implementation, or to examine freedom of movement between States or within the same State. The prevailing view, however, was that greater specificity could be achieved after the discussion of the working paper and that until then the Special Rapporteur should be given a free hand. In the final version of the decision this was reflected in the words "working paper on the right to freedom of movement and related issues".

3. Clearly, on the basis of the text of the decision alone, these related issues include: population movements and displacements, the right to leave and to return to one's own country and the right to seek and enjoy asylum. This list of related issues can be extended by adding those mentioned in Sub-Commission resolution 1996/9 on "The right to freedom of movement", namely: the right of everyone lawfully within the territory of a State to liberty of movement and freedom to choose his or her residence, the prohibition of arbitrary deprivation of the right to enter one's own country and the principle of non-refoulement. The following are also directly related to the right to freedom of movement (regrettably, inasmuch as they deprive populations of that right): forcible exile, mass expulsion and deportation, population transfer, forcible population exchange, unlawful forcible evacuation, eviction and forcible relocation, "ethnic cleansing" and other forms of forcible displacement of populations within a country or across borders.1/

I. THE RIGHT TO FREEDOM OF MOVEMENT AND RELATED ISSUES IN INTERNATIONAL LEGAL INSTRUMENTS

4. The central article on freedom of movement and related issues in the Universal Declaration of Human Rights is, of course, article 13:

1/ See, in particular, Sub-Commission resolution 1996/9.

"1. Everyone has the right to freedom of movement and residence within the border of each State.

2. Everyone has the right to leave any country, including his own, and to return to his country."

5. The following articles of the Universal Declaration throw light on the question of "related issues":

(a) Article 2:

"1. Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty."

(b) Article 7:

"All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination."

This lays down the principle of non-discrimination - the basis of freedom of movement.

(c) Article 3:

"Everyone has the right to life, liberty and security of person."

Freedom of movement is an integral part of the right to liberty.

(d) Article 4:

"No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms."

Slavery and the slave trade are inconceivable in the context of the right of everyone to freedom of movement.

(e) Article 8:

"Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."

The proclaimed right to freedom of movement will be no more than so many words if it cannot be protected in the competent courts or administrative tribunals.

(f) Article 9:

"No one shall be subjected to arbitrary arrest, detention or exile."

Arrest, detention and exile are incompatible with freedom of movement. Exile deprives a person of the right to return to his own country.

(g) Article 10:

"Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."

As the Special Rapporteur Mr. Jose D. Ingles himself correctly noted: "This article underlines the right of everyone to a fair and public trial in the determination, among others, of his right to leave any country, including his own, and to return to his country. It should be pointed out that this article aims at having the rights of the aggrieved party determined by an independent and impartial body rather than left to the discretion of a subordinate official".2/

(h) Article 14:

"1. Everyone has the right to seek and to enjoy in other countries asylum from persecution.

2. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations."

The broadening of the Sub-Commission's agenda item "Freedom of movement" to include "the right to leave and seek asylum and the right to return" itself indicates that the experts see the right to seek asylum as a very important component of "freedom of movement".

(i) Article 15:

"1. Everyone has the right to a nationality.

2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality."

Again, we agree with the conclusion reached by the Special Rapporteur Mr. Jose D. Ingles, namely that: "The right to change one's nationality

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2/ E/CN.4/Sub.2/220, para. 47.

presupposes the right to leave one's country. On the other hand, the guarantee against arbitrary deprivation of nationality ensures one's right to return to one's country".3/

(j) Article 17:

"1. Everyone has the right to own property alone as well as in association with others.

2. No one shall be arbitrarily deprived of his property."

and

Article 19:

"Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

Even in ancient times, such fundamental components of the right to freedom of movement as the movement of people, ideas and goods had already been defined. A person cannot take full advantage of the right to leave a country if he is not allowed to take his property with him. The right to leave a country often depends on the recognition of the right to possess property. At the same time, the freedom to seek, receive and impart information, regardless of frontiers, is the freedom of circulation of ideas, a very important constituent of the freedom of movement.

(k) Article 28:

"Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized."

The relationship between this article and article 13 is obvious.

(l) Article 29:

"1. Everyone has duties to the community in which alone the free and full development of his personality is possible.

2. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

3. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations."

3/ E/CN.4/Sub.2/220, para. 49.

The article imposes reasonable limitations on the exercise of the right to freedom of movement. Having clearly defined the permissible limitations, it rules out the application of others.

(m) Article 30:

"Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein."

The article rules out the destruction of freedom of movement on the pretext of having to implement other rights and freedoms.

If article 6 of the Universal Declaration, which gives everyone the right to recognition everywhere as a person before the law, and the other articles of the Declaration are taken into account, then it becomes obvious that practically all its provisions have a bearing on the right to freedom of movement.

6. The most important international legal instrument establishing the right to freedom of movement is the International Covenant on Civil and Political Rights, articles 12 and 13 of the Covenant being the most informative as regards the content of the right to freedom of movement:

Article 12:

"1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

4. No one shall be arbitrarily deprived of the right to enter his own country."

Article 13:

"An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority."

7. However, other articles of the Covenant are equally relevant to the understanding of the right to freedom of movement. Thus, article 2 imposes the obligation on States to respect and ensure this right on the basis of the

principle of non-discrimination, while article 3 requires them to undertake to ensure the equal right of men and women to the enjoyment of freedom of movement. Article 4 of the Covenant on public emergencies allows States to take measures derogating from their obligations under the Covenant only to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and respect the principle of non-discrimination. Article 5 rules out the exercise of other rights and freedoms to engage in any activity or perform any act to the detriment of the right to freedom of movement. An analysis of the other articles of the Covenant reveals that, as in the Universal Declaration of Human Rights, most have a direct or indirect bearing on the right to freedom of movement.

8. Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination imposes on States Parties the obligation "to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

...

(i) The right to freedom of movement and residence within the border of the State;

(ii) The right to leave any country, including one's own, and to return to one's country;

(iii) The right to nationality".

9. Article 10 of the Convention on the Rights of the Child states that:

(1) In accordance with the obligations under the Convention, "applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family";

(2) "A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances, personal relations and direct contacts with both parents. Towards that end and in accordance with the obligation of States Parties under article 9, paragraph 2 (opportunity to participate in the proceedings and make their views known - V.B.), States Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order (ordre public), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention."

10. Article 11 of the Convention requires States Parties to take measures to combat the illicit transfer and non-return of children abroad, by concluding bilateral or multilateral agreements or acceding to existing agreements.

11. A number of universal international agreements establish recognized standards relating to the right to leave a country and return to it, entry and departure, within their specific areas of competence. Thus, for example, article 44 of the Vienna Convention on Diplomatic Relations states: "The receiving State must, even in case of armed conflict, grant facilities in order to enable persons enjoying privileges and immunities, other than nationals of the receiving State, and members of the families of such persons, irrespective of their nationality, to leave at the earliest possible moment. It must, in particular, in case of need, place at their disposal the necessary means of transport for themselves and their property". Similar provisions can also be found in the Vienna Convention on Consular Relations.

12. The Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character also focuses on these questions, as evidenced by just three articles singled out from among numerous other provisions:

Article 26 - Freedom of movement

"Subject to its laws and regulations concerning zones entry into which is prohibited or regulated for reasons of national security, the host State shall ensure freedom of movement and travel in its territory to its members of the mission and members of their families forming part of their households."

Article 79 - Entry into the territory of the host State

"1. The host State shall permit entry into its territory of:

(a) members of the mission and members of their families forming part of their respective households;

(b) members of the delegation and members of their families accompanying them, and

(c) members of the observer delegation and members of their families accompanying them.

2. Visas, when required, shall be granted as promptly as possible to any person referred to in paragraph 1 of this article."

Article 80 - Facilities for departure

"The host State shall, if requested, grant facilities to enable persons enjoying privileges and immunities, other than nationals of the

host State, and members of the families of such persons irrespective of their nationality, to leave its territory".4/

13 Our notions concerning the regulation of the universal right to leave a country, including one's own, and return to one's country can be considerably expanded by taking into consideration the provisions of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984,5/ the Convention on Certain Questions relating to the Conflict of Nationality Laws of 12 April 1930, the Protocol concerning a Specific Case of Statelessness of 12 April 1930, the Special Protocol concerning Statelessness of 12 April 1930,6/ the Convention relating to the Status of Stateless Persons of 28 September 1954, the Convention on the Nationality of Married Women of 29 January 1957, the Convention on the Reduction of Statelessness of 30 August 1961, the Statute of the Office of the United Nations High Commissioner for Refugees of 14 December 1950, the Convention relating to the Status of Refugees of 28 July 1951, the Protocol relating to the Status of Refugees of 31 January 1967, the Declaration on Territorial Asylum of 14 December 1967, the Conclusions of the Executive Committee of the Office of the United Nations High Commissioner for Refugees,7/ the Agreement relating to Refugee Seamen of 24 November 1957, the Protocol relating to Refugee Seamen of 12 June 1973, etc.

14. Despite the proposals to consider the "Situation of migrant workers and members of their families" under item 3 "Comprehensive examination of thematic issues relating to the elimination of racial discrimination" of the Sub-Commission's agenda and not under item 10 "Freedom of movement", it is impossible to make a thorough study of population displacements and the right to leave and seek asylum and the right to return without taking into account the instruments of international law that regulate migration. Therefore, irrespective of whether the agreement has entered into force or not and is binding or merely makes recommendations, in order to understand the right to freedom of movement it is important carefully to analyse the provisions of the

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4/ United Nations Juridical Yearbook, 1975, New York, 1977, pp. 129, 151-152.

5/ See, for example, article 3 on the expulsion, return or extradition of a person to another State.

6/ Has not entered into force.

7/ See, for example, Conclusion No. 7 (XXVIII) - Expulsion, 1977; Conclusion No. 8 (XXVIII) - Determination of Refugee Status, 1977; Conclusion No. 15 (XXX) - Refugees without an Asylum Country, 1979; Conclusion No. 22 (XXXII) - Protection of Asylum-Seekers in Situations of Large-Scale Influx, 1981; Conclusion No. 30 (XXXIV) - The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum, 1983; Conclusion No. 39 (XXXVI) - Refugee Women and International Protection, 1985; Conclusion No. 40 (XXXVI) - Voluntary Repatriation, 1985; Conclusion No. 44 (XXXVII) - Detention of Refugees and Asylum-Seekers, 1986; Conclusion No. 58 (XL) - Problem of Refugees and Asylum-Seekers who move in an irregular manner from a country in which they had already found protection, 1989; etc.

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families of 18 December 1990, ILO Convention (No. 97) concerning Migration for Employment (Revised) of 1 July 1949, ILO Convention (No. 118) concerning Equality of Treatment of Nationals and Non-Nationals in Social Security of 28 June 1962, ILO Convention (No. 143) concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers of 24 June 1975, ILO Recommendation (No. 86) (Revised) concerning Migration for Employment of 1 July 1949, ILO Recommendation (No. 151) concerning Migrant Workers of 24 June 1975, etc.

15. The examination of this question reveals that as far as freedom of movement is concerned important progress has been made in the matter of its regulation by international law, and not only at the universal level. A positive approach to freedom of movement and, in particular, to the right to leave a country and return has also been adopted in almost all the regional human rights instruments. In confirmation of this it is customary to cite Protocol No. 4 of 16 September 1963 to the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms, Article VIII of the 1948 American Declaration of the Rights and Duties of Man, Article 22 of the American Convention on Human Rights of 21 November 1969, Article 12 of the African Charter on Human and People's Rights of 27 June 1983, and the Final Act of the Helsinki Conference on Security and Co-operation in Europe and its follow-up documents.

16. However, not only in these but also in other regions many more international legal instruments which directly or indirectly concern the right to freedom of movement have been drawn up and put into effect. Underestimating them could affect the depth of the analysis of the problem as a whole. Thus, for example, in investigating these questions, in relation to the European region alone, there are dozens of recommendatory instruments which should be taken into account. These include Protocol No. 7 of 22 November 1984 to the 1950 European Convention on the Protection of Human Rights and Fundamental Freedoms, the Convention on Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality of 6 May 1963, the Protocol of Amendment to the Convention on Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality of 24 November 1977, the Additional Protocol to the Convention on Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality of 24 November 1977, the Second Protocol of Amendment to the Convention on Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality of 2 February 1993, the European Agreement on the Abolition of Visas for Refugees of 20 April 1959, the European Agreement on Transfer of Responsibility for Refugees of 16 October 1980, Recommendation of the Assembly of the Council of Europe 773 (1976) concerning de facto Refugees, Recommendation of the Assembly of the Council of Europe 817 (1977) concerning the Right to Asylum, the 1977 Declaration of the Committee of Ministers of the Council of Europe on Territorial Asylum, Recommendation of the Committee of Ministers of the Council of Europe R (1981) 16 on the Harmonization of National Procedures relating to Asylum, Recommendation of the Committee of Ministers of the Council of Europe R (1984) 1 on the Protection of Persons not Formally Recognized as Refugees, the Convention determining the State responsible for Examining Applications for Asylum lodged in one of the Member States of the European Communities of 15 June 1990, the Agreement establishing a European Union of 7 February 1992, the European Convention on Establishment of 13 December 1955,

the European Social Charter of 18 October 1961, the European Convention on Social Security of 14 December 1972, the European Convention on the Legal Status of Migrant Workers of 24 November 1977, the Agreement establishing a European Economic Community of 25 March 1957, Directive of the Council of the European Economic Community 64/221 of 15 February 1964 on the harmonisation of special measures relating to the movement and residence of foreign nationals, the Regulation of the Council of the Economic Communities 1612/68 of 15 October 1968 on the freedom of movement of workers with amendments introduced by Regulation 312/76 of 9 February 1976, Directive of the Council of the European Communities 68/360 of 15 October 1968 on the abolition of restrictions on movement and residence within the Community, Regulation of the Commission of the European Communities 1251/70 of 29 June 1970 on the right of workers to remain in the territory of a Member State, Directive of the Council of the European Communities 73/148 of 21 May 1973 on the abolition of restrictions on the movement and residence within the Community of nationals of Member States in connection with establishment, entrepreneurial activities and the provision of services, the European Agreement of 13 December 1957 on Regulations Governing the Movement of Persons between Member States of the Council of Europe, the Convention on the Participation of Foreigners in Public Life at Local Level of 5 February 1992, the Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Controls at the Common Frontiers (Schengen Agreement) of 14 June 1985, the Convention Applying the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Controls at the Common Frontiers of 19 June 1990, etc.

17. The fact that these and other instruments were not duly reflected in the reports of Mr. Jose D. Ingles and Mr. C.L.C. Mubanga-Chipoya is not the only reason why they should be examined. Firstly, many of the instruments listed and others not mentioned were adopted after the corresponding studies had been carried out and, naturally, were not considered by the Special Rapporteurs. Secondly, international legal sources often solve the same problems in different ways. Thus, for example, in the Universal Declaration of Human Rights it is stated that "Everyone has the right to freedom of ... residence within the border of each State", while according to the International Covenant on Civil and Political Rights "everyone lawfully within the territory of a State shall, within that territory, have ... freedom to choose his residence". At the same time, the International Convention on the Elimination of All Forms of Racial Discrimination merely guarantees everyone the right to "residence within the border of the State".

18. Of course, the existence of different approaches to the same legal situation allows States to choose to be guided by those principles which are least detrimental to themselves rather than to the individual, and in fact this can give rise to discrimination against the individual. Thirdly, the mandate of Mr. Jose D. Ingles included studying discrimination in respect of the right provided for in article 13, paragraph 2 of the Universal Declaration of Human Rights. The Special Rapporteur Mr. C.L.C. Mubanga-Chipoya was instructed to "prepare an analysis of current trends and developments in respect of the right of everyone to leave any country, including his own, and to return to his country, and to have the possibility to enter other countries, without discrimination or hindrance, especially of the right to employment, taking into

account the need to avoid the phenomenon of the brain drain from developing countries and the question of recompensing those countries for the loss incurred, and to study in particular the extent of restrictions permissible under article 12, paragraph 3 of the International Covenant on Civil and Political Rights".

19. In fact, the mandate of the Special Rapporteur remained essentially unchanged, comprising the same article 13, paragraph 2 of the Universal Declaration of Human Rights plus the brain drain problem and a reference to article 12, paragraph 3 of the Covenant, where the permissible restrictions are listed. The Sub-Commission's agenda item "Freedom of movement" now includes, in addition to "the right to leave" and "the right to return", "the right to seek asylum". This right is provided for in article 14 of the Universal Declaration where it is stated that everyone "has the right to seek and to enjoy in other countries asylum from persecution", but with the important restriction that this right "may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations". However, the International Covenant on Civil and Political Rights does not have any similar provisions. And since in fact they went beyond the scope of the mandates of the Special Rapporteurs, they were not studied comprehensively or in depth.

II. RIGHT TO FREEDOM OF MOVEMENT AND RELATED ISSUES AT NATIONAL LEVEL

20. As noted by the Special Rapporteur Mr. Jose D. Ingles, in 1963 in only 24 countries were the right of a national to leave his country and the right of a national to return to his country officially recognized in the constitution or the legislation. In another 12 countries these rights were recognized in judicial practice. In only 20 countries did the constitution or the law officially recognize the right of a foreigner to leave his country of residence. In 4 more countries this right was recognized in judicial practice. A number of countries which did not have any constitutional or legislative provision or judicial precedent governing this question said that they recognized the right "in principle", "as a rule of law", "in general practice", "according to regulations", "as an enforceable right", "always", or that "there is no authority for denial". This was particularly true as regards the right of a national to return to his country, which had thus been informally recognized by 16 additional countries. True, the Special Rapporteur also stressed that: "it is necessary to probe more deeply into the actual situation before drawing any conclusions in this matter. The formal recognition of a right is not enough to ensure its enjoyment. The law or practice may hedge the right with so many conditions as to whittle it away or render it nugatory" (E/CN.4/Sub.2/220, paras. 16 and 17).

21. As regards the solution of problems of freedom of movement, the Special Rapporteur Mr. C.L.C. Mubanga-Chipoya concentrated his attention on questions of the participation of the State in the Internationcal Covenant on Civil and Political Rights. He also selectively considered the laws and administrative regulations of certain countries in relation to this matter. In general, however, his study was based on the replies of countries to the questionnaire he compiled. Not all these replies reflected the true state of affairs, some merely depicting a desired situation. Thus, "according to the reply of the Union of

Soviet Socialist Republics to the Special Rapporteur's questionnaire, Decree No. 163 of the USSR Council of Ministers of 28 August 1986 introduces in the Statute on entry into the USSR and departure from the USSR of 1970 several new and important provisions. The possibilities of entry and departure are provided to Soviet citizens, foreign citizens and stateless persons 'irrespective of origin, social and property status, race or nationality, sex, education, language or religious attitudes'" (E/CN.4/Sub.2/1988/35, para. 224). In reality, however, in the Soviet Union at the time the Special Rapporteur was completing his final report, citizens of the USSR could depart, say for the United States or a country in Western Europe, only with the permission of the administration at their place of work and the appropriate Communist Party committee.

22. In fact, there has since been a radical change in the legislative situation in the region, but this did not materialize until after the Special Rapporteur C.L.C. Mubanga-Chipoya had finished his work. Naturally, these changes could not have been studied by the Rapporteur. When compared with the existing international standards, some of the changes must be considered positive and others negative. The breakup of the Soviet Union led to the appearance of 15 new States on the world map and in more or less five years these created their own legislation, including laws dealing with questions of freedom of movement and related issues. In most of the countries of the region freedom of movement is guaranteed by the constitution,8/ while in some countries separate laws have been adopted. Admittedly, the constitutional freedoms are often hedged around with laws and administrative regulations which still require registration ("propiska"). The extent to which these constitutional guarantees encourage the assertion of the principle of freedom of movement in the countries of the region or merely shroud the situation in a legislative fog will become clear in the process of investigating the problem. Similarly, only by close study is it possible to tell whether or not discrimination is introduced when a State adopts a law on freedom of movement that applies only to its own nationals. Thus, for example, in 1993 Russia adopted a Law of the Russian Federation "On the right of citizens of the Russian Federation to freedom of movement and to choose their place of residence and abode within the Russian Federation".

23. The active law-making in the countries of the region suggests that many States have taken the results of the study made by the Special Rapporteur Mr. C.L.C. Mubanga-Chipoya into consideration in their enactments. At the same time, not all the legislation takes into account the concerns of the Rapporteur or draws the appropriate conclusions from the recommendations made in the course of the discussion of both the report and the draft declaration on freedom and non-discrimination in respect of the right of everyone to leave any country, including his own, and to return to his country. After proclaiming their sovereignty and independence, the States of the region have not always adopted the recognized international standards as far as freedom of movement and related issues are concerned. While endeavouring objectively to regulate the status of nationals and foreigners, they have not been able completely to avoid legislative discrimination, not only with respect to the "national-foreigner" dichotomy but also among nationals and foreigners themselves. As a result, the

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8/ See, for example, article 33 of the Constitution of the Ukraine.

mistakes have had to be corrected in supplementary legislation, often under pressure from an aroused public. In the rush, the new laws adopted have not always come up to generally accepted standards. Sometimes they have even further confused the legal situation of the individual.

24. The mere enumeration of some of the legislation shows how complicated it can be to understand how the right to freedom of movement and related issues are regulated in the countries of the region. These questions are dealt with in: (a) the various national constitutions (all adopted after the completion of the special report); (b) the nationality laws (all the laws on nationality, like the other laws of the countries of the region relating to freedom of movement, were adopted after the completion of the Special Rapporteur's report and the draft declaration); (c) the laws on refugee status (for example, Azerbaidjan, 1992; Belarus, 1995; Latvia, 1995; Russia, 1993; Tadjikistan, 1994, Ukraine, 1993, etc.); (d) the laws on forcible relocation (for example, Azerbaidjan, 1992; Russia, 1995, etc.); (e) the laws on the State language (Azerbaidjan, 1992; Moldova, 1989; Uzbekistan, 1995, et al.) and language laws (Armenia, 1993; Latvia, 1992; Moldova, 1989; Ukraine, 1989; Estonia, 1995, etc.); (f) the laws on the legal status of foreigners (Armenia, 1994; Belarus, Georgia, Turkmenistan, Estonia, 1993; Kazakhstan, 1995), the laws on the status of citizens of the USSR in a State that has proclaimed its independence (for example the Latvian law of 1995), the laws on the legal status of foreign nationals and stateless persons (Moldova, 1994); the laws on the legal status of foreign nationals and residence laws for foreigners (Kyrgyzstan, both in 1993; Latvia, 1992, etc.); (g) the laws on national minorities (Belarus, 1992; Latvia, 1991; Ukraine, Estonia, 1993, etc.); (h) the laws on the procedure for entry and departure: (i) of nationals (Belarus, 1993; Russia, 1991; Turkmenistan, 1995; Ukraine, 1994, etc.); of nationals and foreigners (Moldova, 1994); of foreigners (Georgia - on temporary entry, residence and departure, 1993); on the entry and residence of foreign nationals and stateless persons (Kyrgyzstan, 1993), etc.; (j) the laws on migration (for example, Moldova, 1990), on emigration (Georgia, 1993; Latvia, 1991, etc.), on immigration (Georgia, 1993; Kazakhstan, 1992; Lithuania, 1991, etc.), on forced migrants (for example, Tadjikistan, 1994) and forcible relocation (Russia, 1995); (k) the laws on freedom of movement and residence (for example, Russia, 1993), etc.

25. These pieces of legislation often differ with respect not only to the terminology employed and the category of people included but also in their treatment of nationals, foreigners and stateless persons as regards the right to freedom of movement and choice of residence, which is often inconsistent with international standards and sometimes discriminatory. As these are questions which were not and could not have been investigated by the Special Rapporteur C.L.C. Mubanga-Chipoya, it is a matter of particular urgency that they be investigated today, since these problems of the region affect not only the peace and security and human rights situation of Europe but that of the world community as a whole.

26. The report of the Special Rapporteur did not reflect the situation in the countries of the former Yugoslavia. Many of the gaps in the report were filled in by the Sub-Commission on Prevention of Discrimination and Protection of

Minorities,9/ the Commission on Human Rights, and the Economic and Social Council. However, there has been no special analysis of the question of discrimination in respect of the right to freedom of movement and related issues in the legislation of the States of the former Yugoslavia.

27. In a number of instances, the conclusions and proposals of the Special Rapporteur were descriptive in nature with respect to countries and regions, did not deal at all with the provisions of the national legislation or are today clearly out of date. The weakest point of the special report is, in our opinion, the section on "Restrictions on entry imposed by national legislation" (E/CN.4/Sub.2/1988/35, paras. 355-381). With a minor exception, the questions relating to this aspect were either not investigated at all or mentioned in passing with reference to the replies of governments or the well-known restrictions of article 12, paragraph 3 of the International Covenant on Civil and Political Rights. Meanwhile, the conclusions of the Special Rapporteur, based on an analysis of the legislation, have proved short-lived either because the States and their legislation have disappeared (USSR, Yugoslavia, Czechoslovakia) or because the laws on which his conclusions rested have been abolished and the new legislation takes a different approach to the problems he raised.10/

28. In many cases, if the problems of freedom of movement were not explored comprehensively and in-depth by the Special Rapporteur, this was not his fault. His mandate was restricted to "the right of everyone to leave any country, including his own, and to return to his country". At the time of the study, the topics "departure" and "return" were in fact the main issue as far as the exercise of the right to freedom of movement was concerned. The ideological considerations by which the former socialist countries were guided made freedom of movement unrealistic and its "implementation" could be reduced merely to the formal assertion of the corresponding principle in the legislation. Today, now that the countries of the socialist system have switched to building democratic societies, the situation has radically changed. In circumstances in which freedom of movement is guaranteed by law but economic crisis, interethnic conflict and civil war prevail, the central problem is no longer "departure" and "return" but "entry" and "non-return". Today, the special report and the draft declaration on freedom and non-discrimination in respect of the right of everyone to leave any country, including his own, and to return to his country both need rethinking and further study.

9/ See, for example, resolutions 1995/10 and 1996/2 ("Situation of human rights in Kosovo"), resolution 1995/1 ("Expression of solidarity with the Special Rapporteur of the Commission on Human Rights on the situation of human rights in the territory of the former Yugoslavia, Mr. Tadeusz Mazowiecki"), resolution 1995/8 ("Situation in the territory of the former Yugoslavia"), resolution 1995/13 ("The right to freedom of movement"), etc.

10/ See, for example, the corresponding provisions of the French legislation.

III. THE SITUATION DURING THE LAST TEN YEARS

29. Since Mr. C.L.C. Mubanga-Chipoya completed his report on "The right of everyone to leave any country, including his own, and to return to his country" the situation with respect to the assertion and implementation of both that right and the right to freedom of movement in general has fundamentally changed. In Europe alone, the Berlin Wall has been torn down, the Soviet Union and Yugoslavia have broken up, and Czechoslovakia has split in two. Interethnic conflicts and civil war have rolled through Europe, Asia, Africa and Latin America. These events, together with the liberalization of border-crossing procedures in the countries of Eastern Europe, have resulted in an intensification of migratory processes, an increase in the number of refugees, displaced and relocated persons, etc. In many countries, the right to freedom of movement has effectively been replaced by an enforced lack of freedom to move or flee. In a number of countries, there is such a wide variety of migrants and refugees that it is often difficult to "squeeze" them into the existing international standards.

30. Thus, in the countries of Eastern Europe, migrants are divided into internal and external. Internal migrants are divided into natural and environmental (especially numerous after the earthquake in Armenia, Chernobyl in the Ukraine, and the drying up of the Aral Sea in Central Asia). In the countries formed after the breakup of the Soviet Union, among the external migrants it is possible to distinguish: (a) those returning to their mother country from former Soviet republics (repatriates); (b) those illegally deported on the basis of their nationality; (c) migrants from the "near abroad" forced to leave their country of residence; (d) refugees from the "far abroad"; (e) illegal migrants from the "far abroad"; (f) transiting illegal migrants.

31. Since this classification is not always consistent with the existing international standards and since each subdivision of the classification is being quite actively dealt with in the legislation, in practice cases of not only de facto but also legislative (legal) discrimination are commonly encountered. As one progresses along the scale from repatriates to transiting illegal migrants, the legal safeguards become feebler and discrimination increases with respect to practically all the criteria in relation to which discrimination is prohibited in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

32. In the Eastern European region, especially on the territory of the former Soviet Union, where even in the eighties leaving the country was a major problem, huge waves of migration are almost overwhelming the efforts of the authorities to regulate the process. The conflicts in Armenia, Azerbaidjan, Georgia, Moldova, Northern Ossetia, Tadjikistan, Chechnya and especially on the territory of the former Yugoslavia have generated equally massive flows of refugees. The streams of refugees and the flood of migrants have together created enormous waves of displaced people which have not only rolled through the European continent but have also affected the United States, Canada and countries on other continents.

33. In their attempts to halt or slow these movements, countries have tightened up their legislative requirements with respect to refugees and migrants, which has led to an increase in the numbers of illegal migrants and

refugees. To combat this, ever stricter amendments have been introduced into the legislation, as a result of which in some countries it has become problematic to speak not only of the right to freedom of movement but even of respect for the dignity of persons crossing the border.

34. An important factor in this process is the reaction of the population of the countries to which the refugees and migrants have moved. In the former socialist countries, which had previously attracted hardly any foreigners intending to stay for a more or less extended period of time, the changed situation has generated the new, previously unknown problem of the adaptation of refugees and migrants to local conditions and the local population's perception of them. One of the students of this process in the territory of the former USSR notes that: "The mass media view the arrival of foreigners from the far abroad (countries outside the former USSR - V.B.) in the territory of these countries (former republics of the USSR - V.B.) as a problem that poses a threat. They hardly ever present it in a humanitarian-humanistic light. ...In the regions which accept migrants, the attitude towards them may vary from tolerance through indifference to suspicious xenophobia and downright hostility."11/ Of course, this is still no Yugoslav-type "ethnic cleansing", but it is far from being the result of freedom of movement. The same author suggests that since in these regions no one is analysing the attitude of the local population to foreigners (migrants), the problem of xenophobia and even hostility may come as a surprise to the public and especially the authorities.

35. The countries formed on the territory of the former USSR face the novel problem of transiting illegal migrants from the countries of South-West Asia, Africa and the Middle and Near East who, taking advantage of the liberalization of the region's border regimes, are trying to reach the countries of Western Europe. The Ukrainian media report that, in 1995, 18.2 million foreigners entered Ukraine while only 17.4 million left, i.e. 800,000 remained in the country. Only half that number registered with the authorities. The Russian media report 12/ that the country has about 500,000 illegal migrants. Failing to find understanding on the part of the authorities and the population and feeling themselves rejected by the local community, the illegal migrants turn to crime, which reinforces the hostile-xenophobic attitude towards them. The circle is closed. In the Ukraine alone, in 1995, administrative proceedings were taken against 70,000 foreigners from more than 100 countries. One in every seven was expelled from the country for crossing the border illegally 13/. However, the foreigners themselves do not want to remain in Eastern Europe. Their main aim is to cross into the countries of Western Europe.

36. This has begun to develop into an illicit business. Fake travel agencies, joint enterprises, commercial establishments and limited-liability companies are being set up for this purpose. Criminal business organizations have turned human beings into merchandise. Their development has already reached the stage of

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11/ Mikola Shul'ga, Zovnishnya migratsiya v Ukraini: napryam, sklad, masshtabi, "Prava lyudini v Ukraini", Kiev, 1996, No. 17, pp. 13-14.

12/ "Izvestiya", 7 July 1994.

13/ Mikola Shul'ga, ibidem, p. 18.

"specialization". Thus, a Ukrainian-Pakistani firm "Radzha-interpraiz" registered in Kiev specialized in preparing false travel documents for foreigners and sending them to the West. The Israeli firm "Novyi gorizont" transported illegal migrants whom it passed off as students at a Ukrainian educational institution. Whereas in 1992 only five such groups were discovered in the Ukraine, by 1994 the number had risen to 78, and in 1995 91 were exposed in the first six months alone.14/ In transporting foreigners across the border the criminal groups show less concern for them than they would for a load of goods. In 1996, a refrigerator truck transporting Chinese nationals was stopped at the State frontier between Ukraine and Slovakia. Out of the 40 people detained 10 were suffering from severe frostbite and needed resuscitation.

37. Little has changed in the countries of the region with respect to the right to freedom of movement, even for the local population. Even in those countries in which the right to freedom of movement is embodied in the constitution or the law, it is not easy to exercise in practice. On 25 June 1993, Russia adopted the Law "On the right of citizens of the Russian Federation to freedom of movement and to choose their place of residence and abode within the Russian Federation". However, as noted by the investigator of the Russian passport and permit systems K. Lyubarskii, "In actual fact, this law is without effect in the Russian Federation. Throughout Russia, as before, the police continue to inssist that citizens comply with the registration requirements. The situation is especially acute in Moscow, where the Mayor of Moscow, Yu. Luzhkov, has signed an order introducing "Temporary regulations concerning the special procedure governing the residence in the city of Moscow - capital of the Russian Federation - of citizens living permanently outside Russia". Under this order, which consists of 27 paragraphs, on 15 November the city introduced a "special residence regime", in accordance with which all citizens of countries of the near abroad staying in the capital for more than 24 hours must register and pay a fee equivalent to 10% of the Russian minimum wage. Anyone failing to register is promised a fine of three to five times the minimum wage with 50 times the minimum wage for repeat offenders plus expulsion from Moscow, either at their own expense or at the expense of Moscow Police Headquarters.

38. Similar measures have been introduced by the Mayor of Saint Petersburg, A. Sobchak, and by the administrations of a number of other administrative units. All these orders are contrary not only to the federal law on freedom of movement but also to article 27 of the new Constitution of the Russian Federation. "Since citizens of the CIS are covered by an agreement which provides for them to enter Russia without visas, the orders of the two mayors are not only unlawful but also unconstitutional".15/

39. The right to freedom of movement is more than just the right to cross the border. It is also the right to normal living conditions in the country of residence. Meanwhile, according to the Committee of Afghan Emigrants in the Ukraine, Afghans have no housing, no medical care, and no possibility of being placed in suitable jobs, obtaining special assistance, obtaining the passports to which under the legislation and international law they are entitled in order

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14/ Ibidem, p. 19.

15/ "Novoe vremya", 1994, No. 2.

to enjoy normal living and working conditions, or obtaining the right to travel freely. The Afghan emigrants complain about the lack of security. They are often subjected to attacks by individual thugs and gangs, both where they live and where they work. "We do not even have the right to go out on the street - they write - or buy bread freely. In other countries, regardless of nationality, origin, colour or language, people can turn to the authorities when they are in trouble. The police protect them and treat them as free and protected people. But in the Ukraine we cannot turn to the law enforcement services. If we do, they insult and humiliate us, beat us or send us to prison for at least 7 or even 30 days. After that they kick us out. If we are registered, they cancel our registration or just give us a visa for 30 days with a warning. If we are unable to leave the country, we go back to jail and nobody can get us out. Every refugee knows this. In spite of our political, economic and social difficulties, they fine us on every street corner, or we must pay the policeman a bribe."16/ Even if this testimony is emotionally exaggerated, it certainly illustrates how difficult it is for foreigners to be accepted by and adapt to the local community. Unfortunately, similar complaints can be heard in many countries of the region, even those considered to be well off from the liberal, economic, social and political points of view.

40. In the territory of the former Yugoslavia the situation as regards respect for the right to freedom of movement is even worse. As noted by the Special Rapporteur of the Commission on Human Rights, Ms. Elizabeth Rehn, in the periodic report "Situation of human rights in the territory of the former Yugoslavia", the Dayton Agreement "expressly commits the parties to ensuring freedom of movement and incorporates international law guaranteeing this right. ... Nevertheless, restrictions on movement are common in Bosnia and Herzegovina, particularly along the Inter-Entity Boundary Line (IEBL) but also between territories controlled by Bosniak and Bosnian Croat authorities within the Federation. Federation traffic between Sarajevo and Gorazde, passing through Rogatica and crossing territory under Republika Srpska administration, remained at great risk at the end of 1996. ... The Special Rapporteur is deeply concerned about arrests of travellers for alleged complicity in war crimes, which have sometimes been made with little apparent basis and in violation of provisions of the so-called "rules of the road" agreed to by the parties at Rome in February 1996. Under that agreement, non-indicted war crime suspects are to be held only following notification by the International Criminal Tribunal at The Hague that a basis for such detention exists. Arrests violating this agreement have caused great fear on both sides of the IEBL and imperilled freedom of movement throughout Bosnia and Herzegovina. ... Prospects for returns to the ZOS have been seriously damaged by the wide-scale deliberate destruction of abandoned homes. ... Within the Federation also, returns have been obstructed by the deliberate destruction of homes, particularly in Bosnian Croat controlled territory. ... Bombings of Croat-owned homes were reported in the Bosniak-controlled towns of Konjic and Vares".17/

41. These violations of the right to freedom of movement are also typical of other regions. Since the Special Rapporteur C.L.C. Mubanga-Chipoya completed his

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16/ "Prava lyudini v Ukraini", Kiev, 1996, No. 17, p. 129.

17/ E/CN.4/1997/56, paras. 8, 9, 12, 17 and 19.

report, the implementation of the right to freedom of movement has improved in some respects but, unfortunately, worsened in others. Thus, the Special Rapporteur noted the following trend: "From the time when Mr. Ingles finished his report the universal understanding and recognition of the right to leave and return among individuals and Governments has increased."18/ Although this assertion was made with extreme caution ("among individual States and governments" [sic]), today, unfortunately, it needs to be made more specific: understanding of the right to leave and return to one's own country has increased. As far as entering another country is concerned, the visa issuing procedures have, unfortunately, become more complicated, to such an extent that if States do not relax the existing regimes, the right to freedom of movement as a whole may be placed in jeopardy.

42. The Special Rapporteur C.L.C. Mubanga-Chipoya was overoptimistic when he concluded that: "Freedom of movement within the country ... has progressed substantially and only a few examples could be mentioned of the limitation of this freedom."19/ The concepts of "protection of national security", "protection of public order", "protection of public health and morals" and "protection of the rights and freedoms of others" still need to be defined more precisely. These concepts, which comprise the permissible restrictions, are often interpreted and used for the purpose of suppressing freedom of movement. For the most part, the definitions proposed by the Special Rapporteur in the draft Declaration were rejected by governments.

43. The Special Rapporteur correctly noted that: "The right to leave is directly dependent on the ability or possibility to enter another country. Indeed, for them to be effective, both these aspects of the freedom of international movement should be addressed and settled at one and the same time. States should be encouraged to take international and regional measures and to reduce the necessity for entry visas on temporary visits. All forms of discrimination in this respect should be eliminated."20/ Unfortunately, this appeal of the Special Rapporteur's is even more pertinent today. Little progress has been made in fulfilling the Special Rapporteur's wishes with regard to migrant workers, the "brain drain", family reunification, refugees, etc. In his view, "the recourse procedures included in national legislations should be left to independent judicial or non-judicial bodies". Unfortunately, a new study of this area might well lead to the same desire again being expressed.

IV. CONCLUSIONS AND PROPOSALS

44. In 1954, at its 6th session, the Sub-Commission decided to place on the agenda the question of the procedure to be followed in studying discrimination in the fields of emigration, immigration and travel. The Special Rapporteur Jose D. Ingles was appointed and in 1960, after a lengthy process of definition of the subject of the study, began to analyse discrimination in respect of the

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18/ E/CN.4/Sub.2/1988/35, para. 508.

19/ E/CN.4/Sub.2/1988/35, para. 512.

20/ Ibidem, paras. 524, 525, 526.

right of everyone to leave any country, including his own, and return to his country, as provided in article 13, paragraph 2 of the Universal Declaration of Human Rights.

45. In 1962, Jose D. Ingles completed his "Study of discrimination in respect of the right of everyone to leave any country, including his own, and to return to his country" and drew up the "Draft principles on freedom and non-discrimination in respect of the right of everyone to leave any country, including his own, and to return to his country". The Sub-Commission submitted the report and the draft principles to the Commission on Human Rights and at its 17th-21st sessions inclusive expressed the hope that the Commission would take the initiative in completing the consideration of the report prepared by Jose D. Ingles and the draft principles approved by the Sub-Commission.

46. At its 20th to 24th sessions inclusive the Commission postponed the discussion of the agenda item relating to this study. It was included in the agenda of the 25th-29th sessions of the Commission on Human Rights but considered only in 1973. The Commission did not take any substantive measures. On 18 May 1973, in resolution 1788 (LIV) ECOSOC instructed the Commission on Human Rights to consider the question of the right of everyone to leave any country, including his own, and to return to his country at three year intervals coinciding with its discussion of the periodic reports on civil and political rights.

47. At its 35th session, the Sub-Commission appointed Mr. C.L.C. Mubanga-Chipoya to prepare an analysis of current trends and developments in respect of the right of everyone to leave any country, including his own, and to return to his country, and to have the possibility to enter other countries, without discrimination or hindrance, especially of the right to employment, taking into account the need to avoid the phenomenon of the brain drain from developing countries and the question of recompensing those countries for the loss incurred, and to study in particular the extent of restrictions permissible under article 12, paragraph 3 of the International Covenant on Civil and Political Rights. The Sub-Commission considered the report and the draft declaration at its 40th session. In resolution 1989/25 of 31 August 1989, the Sub-Commission expressed its appreciation and thanks to the Special Rapporteur, Mr. Mubanga-Chipoya, for the important contribution he had made to the legal doctrine relating to the right of everyone to leave any country, including his own, and to return to his country. At its 42nd session, the Sub-Commission decided to establish a sessional open-ended working group, representing the various regional groups, with a view to preparing a revised version of the draft declaration on freedom and non-discrimination in respect of the right of everyone to leave any country, including his own, and to return to his country.

48. At the Sub-Commission's 42nd session, the sessional open-ended working group discussed the question of the scope of application of the draft declaration, articles 1 and 2, and the formulation of articles 1-4 of the draft. At the Sub-Commission's 43rd session, the working group discussed the new consolidated draft declaration and decided to use the session to identify the main areas of dispute. On 29 August 1991, the Sub-Commission decided to transmit to the Commission on Human Rights the report of the 1991 session of the Working Group on a draft declaration on the right of everyone to leave any country, including his own, and to return to his country, inviting the Commission to

provide comments and guidance on the issues mentioned in the report. At its 48th and subsequent sessions, the Commission took no decisions with respect to this question.

49. At its 44th session, the Sub-Commission decided to include in the provisional agenda of its 45th session an agenda item provisionally entitled "Freedom of movement". At its 45th session the Sub-Commission decided to include in the agenda of its 46th session under the item on freedom of movement a sub-item on the situation of migrant workers and members of their families. In accordance with the draft provisional agenda of the 49th session of the Sub-Commission, it is proposed that this sub-item be excluded from the item on freedom of movement and considered together with the sub-item "xenophobia" under the item "Comprehensive examination of thematic issues relating to the elimination of racial discrimination". At the same time, at its 46th session, the Sub-Commission decided to include in the agenda item entitled "Freedom of movement" the sub-item "Population displacements".

50. At its 2nd meeting on 6 August 1996, the Sub-Commission decided to add to its agenda a new sub-item 18 (c) entitled "The right of everyone to leave any country, including his own, and to return to his country". The Chairman of the Sub-Commission, in collaboration with the Secretariat, completed the preparation of the draft provisional agenda for the Sub-Commission's 49th session, item 10 of which was worded as follows: "10. Freedom of movement: (a) population displacements; (b) the right to leave and seek asylum and the right to return". This item was to be considered once every two years, starting in 1997.

51. In the course of the 45 years since the Sub-Commission's 5th session the problems of freedom of movement have been discussed at its sessions. Various proposals have been made with respect to the agenda as it relates to this question and the discussions have taken various directions. Initially, Mr. Meneses-Pallares proposed the consideration of "discriminatory practices in the field of migration". However, the Sub-Commission chose to study "measures to combat discrimination, including in the field of immigration and travel". At its 6th session (1954), the Sub-Commission decided to carry out studies of "discrimination in the matter of emigration, immigration and travel". Then the Commission on Human Rights recommended that a study of "discrimination in the matter of emigration and the right to return to one's country as provided in paragraph 2 of article 13 of the Universal Declaration of Human Rights" be undertaken and that "immigration and travel" be deleted from the agenda. The Economic and Social Council requested the Sub-Commission to study only paragraph 2 of article 13 of the Universal Declaration of Human Rights, after excluding discrimination in the matter of emigration.

52. The Sub-Commission proposed that ECOSOC should take a decision that did not prevent the study of the question of discrimination in the field of immigration. ECOSOC did not accept the Sub-Commission's proposal. At its 11th session, the Sub-Commission noted that ECOSOC's decision did not prevent it from studying the four interrelated rights set out in article 13 of the Universal Declaration of Human Rights: (1) the right to freedom of movement; (2) the right to choose one's residence; (3) the right to leave any country, including one's own; (4) the right to return to one's country. ECOSOC did not agree to this broadening of the scope of the study. At its 12th session (1960), the Sub-Commission finally approved the initiation of "a study of discrimination

in respect of the right of everyone to leave any country, including his own, and to return to his country as provided in article 13, paragraph 2 of the Universal Declaration of Human Rights".

53. Formally, the Sub-Commission also imposed this framework on the study to be made by the Special Rapporteur, Mr. C.L.C. Mubanga-Chipoya, having entrusted him with the preparation of an analysis of current trends and developments in respect of the right of everyone to leave any country, including his own, and to return to his country. However, by adding "and certain other rights or considerations arising in connection therewith" the Sub-Commission considerably broadened the Rapporteur's mandate. The meaning of the words "certain other rights or considerations" is explained in Sub-Commission resolution 7 (XXXIV) of 9 September 1980 which equates them to at least a study of "the possibility to enter other countries, without discrimination or hindrance, especially of the right to employment, taking into account the need to avoid the phenomenon of the brain drain from developing countries and the question of recompensing those countries for the loss incurred, and to study in particular the extent of restrictions permissible under article 12, paragraph 3 of the International Covenant on Civil and Political Rights". Considering that the Special Rapporteur examined the questions of migration, asylum and refugees, family reunification, etc., it would be correct to conclude that the scope of the study was in fact additionally expanded. Subsequently, the range of problems considered under the head of "freedom of movement" has broadened further.

54. The list of rights subject to study has also changed considerably as compared with the original version. Whereas, to begin with, it was a question of the individual human right to leave any country, including one's own, and the right to return to one's country, collective as well as individual rights have since been studied, and not only in connection with the problem of leaving and entering one's country. More than ten additional rights, and even more related violations, have been considered by the Special Rapporteurs and the Sub-Commission in the course of investigating this subject.21/ However, the anticipated final document on the questions studied has, unfortunately, not been adopted. Neither the "draft principles on freedom and non-discrimination in respect of the right of everyone to leave any country, including his own, and to return to his country" of Jose D. Ingles nor the "draft declaration on freedom and non-discrimination in respect of the right of everyone to leave any country, including his own, and to return to his country" of C.L.C. Mubanga-Chipoya has advanced far beyond authorial proposals. At the same time, many of the conclusions and proposals of the Special Rapporteurs now require further study. With respect to some aspects of the problem the situation has radically changed and, in fact, a new study is needed. The violations of human rights and freedoms in connection with the exercise of the right to enter a foreign country are so numerous that it has become a matter of urgency to adopt an optional protocol to the International Covenant on Civil and Political Rights concerning the right of entry. Clearly, it is necessary to complete the work undertaken by the Special Rapporteurs Jose D. Ingles and C.L.C. Mubanga-Chipoya. In view of the fact that since the submission of the last report and the draft declaration the situation has changed considerably, it would be desirable to carry out a new study on the basis of those previously conducted. It seems that the scope of this study should not extend beyond the limits of articles 12 and 13 of the International Covenant on Civil and Political Rights.

21/ See, for example, paragraph 3 of this working paper.